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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. .....

ALEX HOLLANDER,

Petitioner,

against

GEORGE HOLLANDER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered June 17, 1963, which affirmed an order of the District Court for the Southern District of New York adjudicating petitioner in contempt of court and fining him therefor.

The Opinions Below

The appeal herein to the Court of Appeals was from an order of District Judge Dudley B. Bonsal, entered November 19, 1962, which adjudicated petitioner in contempt of court and imposed fines aggregating $4,379 for an allegedly deficient compliance with a November 3, 1961 judgment by Judge Dimock directing petitioner to account for stock transactions in 1945-7; and notice was given that

there were brought up for review also intermediate orders by Judge Bonsal and by District Judge Archie D. Dawson, dated April 23, 1962 and February 2, 1962, respectively.

The opinion of the Court of Appeals (as yet unreported) is appended hereto (at pp. 13-14, *infra*).

The final opinion of Judge Bonsal (unreported) is printed in petitioner's Appendix to the Court of Appeals (hereinafter referred to as the Appendix or as A) at pages 67a-69a). Nine copies of that Appendix are being submitted herewith.

Judge Bonsal's opinion and order of April 23, 1962 is at pages 39a-41a of the Appendix. The pertinent portions thereof are quoted at page 8, *infra*.

Judge Dawson's opinion (unreported) is at pages 28a-29a of the Appendix.

The pertinent portions of Judge Dimock's opinion and findings appear at pages 5a-11a of the Appendix and his judgment appears at pages 12a-13a of the Appendix.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

The judgment of the Court of Appeals was entered on June 17, 1963.

A timely petition for rehearing was filed on June 27, 1963. A copy thereof is appended at pages 16-17, *infra*. It was denied, without comment, on July 2, 1963. A copy of the order of denial is appended at page 15, *infra*.

Question Presented

Petitioner's appeal raised, and the decision of the Court of Appeals presents, the following question:

> Is due process to an alleged contemnor (charged with wilful disobedience of a mandate to account) denied, or substantially impaired—is the judicial process unfairly weighted against the accused—when a District Court, in referring the factual issues to a Special Master to hear and report thereon, directs, in advance of the hearing, that the costs of such hearing shall be borne by the accused?*

These costs, after the hearing, were fixed at $4,379—$1,000 counsel fee to plaintiff's attorney plus $379 disbursements and $3,000 to the Special Master (A 72a).

In this case, the Court of Appeals recognized that

> "The issue on the merits is whether the defendant [petitioner] made a bona fide effort to comply with the District Court's mandates. In such a situation [since the evidence was conflicting], demeanor has crucial importance. . . ."

The Special Master, who heard 856 pages of testimony and considered numerous exhibits, reported that he was satisfied—despite the testimony to the contrary by petitioner's attorney of record as well as petitioner—that peti-

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* This point was argued in the Court of Appeals at pages 22-4 of the brief presented to that court; a reproduction of that portion of the brief is appended hereto at pages 18-20. Because the Court's opinion passed it over in silence, it was the subject of the petition for reargument (reproduced at pp. 16-17, *infra*). Other points were raised on the appeals that the evidence as a matter of law was insufficient to warrant the adjudication; that the intermediate order of Judge Dawson was erroneous, as a matter of law, in requiring petitioner "to take a position" under oath on factual matters which petitioner averred it was impossible for him to supply in the absence of records which had gone astray in the fifteen years which had intervened between the transactions and the judgment to account. Since the Court of Appeals ruled that the proper disposition of this case depended upon the evaluation of the conflicting evidence bearing on *bona fides*, the sole point sought to be presented to this Court is the one that the impartiality of the trier of the facts—the Special Master—was seriously impaired by the advance directive that the accused shall bear the costs of the hearing—which here aggregated $4,379.

tioner had wilfully and intentionally imperfectly complied with the mandates to account. Judge Bonsal's adjudication and fines rested upon the acceptance of that report. The Court of Appeals affirmed on the ground that since the Special Master had the benefit and advantage of observing "demeanor," there was "no basis for setting aside the determination of two District Judges and the Special Master."*

The Constitutional Provision Involved

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ." (Fifth Amendment)

The Pertinent Facts

The following is added as a statement of the setting in which the question here presented arose.

In this action which, solely on the ground of *diversity of citizenship*, had been commenced in 1956 in the United States District Court for the Southern District of New York, a lengthy trial before District Judge Dimock resulted in a judgment, entered November 3, 1961, in which the Court dismissed plaintiff's claim of partnership in the defendant's business, awarded judgment for $3,165 admittedly due for money loans and directed the petitioner to account to the plaintiff for stock transactions which the petitioner admitted he had made in 1945-7 for the joint account of the plaintiff and himself (A 1a, 12a-13a). That accounting was ordered because Judge Dimock was not satisfied that the evidence of the accountings between the parties to the latter part of 1947 constituted an account stated (A 10a-11a).

The judgment directed that

". . . the defendant Alex Hollander account to the plaintiff for his purchases, during the period from

* Neither of the "two District Judges" had the benefit of "demeanor." Only the Special Master was thus advantaged.

January 1, 1945 to and including 1947 of shares of stock for the joint and equal account of himself and the plaintiff, and the sale thereof, and the monies received from Alex Hollander for such transactions and payments made to him. . . ."

The petitioner prepared and filed an account (A 14a-27a). Therein he explained (A 14a) that in the over fourteen years which had elapsed since the last transaction many of his pertinent stock records had gone astray, since "having fully accounted to the plaintiff in 1946 and 1947, at which time balances were struck and satisfied" he "had no reason to take pains, and took no pains, to preserve the records". Among the records he was unable to locate, he swore was a memorandum book in which he had recorded and separated his transactions for the joint account of himself and plaintiff from his other stock transactions, and, since the transcripts of the brokerage accounts which had been procured from the brokers for the purposes of the trial included all of his transactions during that period without differentiation of those for the joint account from those which were not, he could do "no better than" treat, for the purpose of the accounting, all his transactions as having been for joint account (as plaintiff had contended they were).

Contending that petitioner's failure to segregate the transactions for the joint account from the whole of his transactions was a wilful disobedience of the judgment and claiming other defects in the account, plaintiff moved to have petitioner adjudged and fined for contempt of court (R. 903-929), even though at the trial plaintiff insisted that every stock transaction which petitioner had engaged in in and after 1943 was for the joint account of himself and the petitioner.

On that motion, District Judge Dawson, in a memorandum and decision dated February 2, 1962 (A 28a-29a), held that petitioner's account "fails to comply with the

judgment" because "It is not an account 'in the form of debtor and creditor'" and petitioner "does not indicate which of the transactions, in his opinion, were part of the joint account in which the plaintiff was interested or what was done with securities in such account". Judge Dawson proceeded to say that petitioner (A 29a)

> "must himself take a position as to which securities were in the joint account and which were not, and which monies are to be treated as in the joint account and which are not".

Because he felt that the account as filed was due to misunderstanding, Judge Dawson denied so much of the motion as sought to hold petitioner in contempt, but did so "without prejudice . . . to renewal of the motion in the event defendant again fails to comply with the order of the court" and directed petitioner to furnish "the full and detailed statement, sworn to by him, of his account, in the form of debtor and creditor' as directed by the order of Judge Dimock dated November 3, 1961" and warned that "further failure of defendant to comply precisely with this order may be punishable by contempt" (A 29a).

The account which thus was rejected, in fact—as subsequently was testified to before the Special Master by an accountant called by plaintiff—simply and intelligently supplied all the pertinent facts and figures of all of the petitioner's stock transactions in 1945-7 (A 44a-48a).

However, in view of the rejection thereof, petitioner filed a new account, recast "in the form of debtor and creditor," but basically unchanged in substance, because, in the continued absence of records, petitioner found it impossible, under oath, to "take a position as to which securities were for the joint account and which were not" (A 36a-38a).

The plaintiff then moved a second time to have petitioner adjudged in contempt, substantially on the same grounds as the first motion with the added ground that this time

petitioner had defied Judge Dawson's order as well as the original judgment.

That motion came before Judge Monsal. Affidavits by the petitioner's attorney and by the petitioner (A 30a-38a) fully explained the situation. They pointed out that the second account, like the first, contained all the data that petitioner could possibly furnish in the absence of his "basic original record" which "repeated and extensive searches have failed" to bring to light (A 37a-38a; see also paragraphs numbered 13-15, 17 at A 31a-33a). In those affidavits, plaintiff's specific criticisms of the account, other than the failure to segregate the joint transactions from the other transactions, were taken up and shown to be erroneous (34a-36a). Both the petitioner and his attorney swore that everything possible had been done, with the aid of certified public accountants "to comply with the spirit and the letter of the judgment and order in this case" (A 31a); that petitioner had "not spared either time or expense in his efforts to furnish the information" (A 31a; see also A 33a, 34a); that "the account has been made up as best it could be on the basis of the data on hand . . . Alex can do no better and no more" (A 37a); that petitioner had "done everything within [his] power to fully and completely and meticulously comply with the directions to account" (37a); that petitioner "was unable to set forth by dates and amounts, [his] payments to the plaintiff, since [his] records of that are missing" but since he knew "that the plaintiff and [he] had a settlement of accounts in 1947 and again in 1949, at which time the records were available and were inspected and [they] then squared [their] accounts", he credited himself "in the amended account, as [he] did in the original account, with having paid the plaintiff the $3,000 which he contributed plus one-half of the net profits" (A 38a); and that petitioner did "not know of anything more or different that [he] can do to comply with the judgment" having "accounted to the best of [his] ability, knowledge, information

and belief, with the aid of competent accountants and competent attorneys" (A 38a).

Finding, however, on the face of the account deficiencies in compliance, Judge Bonsal referred the matter to a Special Master to "hear testimony, receive reports, check vouchers" and report, and Judge Bonsal reserved decision "pending the report of the Special Master". However, Judge Bonsal directed (A 41a):

> "*All costs of the proceeding before the Special Master shall be paid by the defendant Alex Hollander. The amount of such costs shall be fixed by the Court.*" (Italics supplied.)

At the hearings which followed before the Special Master, petitioner's attorney of record as well as petitioner testified, in great detail, to the effort that had gone into the preparation of the accounts and the conscientiousness and good faith of the endeavor to account as fully, accurately and minutely as was possible in the circumstances. Petitioner repeated the testimony which had been given at the trial and the averments he had made in his affidavits that the original records had gone astray and exhaustive repeated searching had failed to produce them (R. 99-104, 256-268, 289-320) and there was added the attorney's testimony in respect thereto (R. pp. 755-63).

However, while the hearings were proceeding, petitioner at the end of May, 1962 moved his home from the two-story and basement and garage private dwelling he had occupied for over twenty years, and in the course of that moving, when it was necessary to get everything out from the remote nooks and corners, in examining numerous tied up cartons which had been stowed away, *petitioner found* at the bottom of a carton of engravings and books a bag containing original brokers' statements and cards in his handwriting, which upon study (including comparison with the brokers' transcripts and such of the checks as were

still extant) turned out to be an original record of purchases and sales in 1945-1946 in which the joint account transactions were separated from the others and which contained other pertinent data (A 58a-60a; R. 380-671, 764-810). The petitioner's recollection had been that he had recorded the transactions in a notebook; the cards had so completely gone out of his memory that even after discovering and studying them they did not return to his memory (R. 450-4, 508-9, 513-17). But there they were, yellowed with age, containing in his own handwriting a complete record of every purchase and sale which he had made for the joint account of the plaintiff and himself and containing also a partial record of his payments to the brokers for those transactions (A 59a-60a). The information on the cards as to dates of purchase and sale and prices coincided with that appearing in the brokers' statements, except for variances of several days accounted for by the usual lag between date of order and date of completion of execution.

The fortuitate finding of those cards put petitioner in the position of being able to file a new account confined to the stock transactions in which the plaintiff had an interest, and leave was asked for an opportunity to prepare and file a new and superseding account.

The Special Master reported against petitioner in a report which fills sixteen pages of the Appendix (A 49a-64a). Petitioner filed exceptions thereto and moved for a determination in petitioner's favor and for a reconsideration by Judge Bonsal of his direction in the order of reference that the costs of the hearing be paid by the petitioner (A 64a-66a).

Petitioner's exceptions were overruled, his motion was denied, he was adjudicated in contempt, fined an aggregate of $4,379 and $3,000 more if the new account he was directed to file did not comply with the judgment and orders and some additional instructions set forth in the order of adjudication (A 67a-73a).

Reasons for Granting the Prayed-For Writ

It is unnecessary to elaborate the proposition that our judicial traditions require that triers of fact shall be as free as humanly possible of subconscious as well as manifest prejudicial influence. Nor is it necessary to document the proposition that such a requirement inheres in the constitutional guaranty of "due process"; there is no "due process" in the absence of a fair trial and, patently, a trial is not fair where the trier of the facts is not free of influences insidious to disinterested objectivity.

It certainly offends notions of fair play and due process to impose, as a condition for affording an accused a hearing, that he pay the costs of such a hearing. Normally it is only a losing party who is required to pay costs. Had the Special Master reported that, on the basis of the evidence developed before him, he could not recommend an adjudication of contempt, the advance direction that the costs of the hearing be borne by the defendant (the present petitioner) would have appeared to have been unsupportable. It cannot be assumed that the Special Master's objectivity was not subconsciously impaired by the realization that, because of the advance direction that the costs of the hearing be borne by the defendant, a report of acquittal would be quite embarrassing to the Judge who had appointed him.

The same embarrassment confronted Judge Bonsal on petitioner's motion to reject the Special Master's report and to deny the contempt application. The granting of that motion would have placed the Judge in the position of either imposing upon one falsely accused the costs of the hearing which resulted in his acquittal or, in reversal of his order of reference, shifting, *ex post facto*, the bearing of the costs from the accused to the accuser. Neither alternative was delectable; and dilemma was avoidable by finding the accused guilty. Who, in such circumstances, would not be subconsciously influenced to decide against the accused?

We know of no precedent for such a tainting of the judicial process by an advance provision that the costs of a hearing, regardless of its outcome, shall be borne by the accused. Such an impairment to disinterested evaluation of conflicting evidence, it is submitted, should not be sanctioned or overlooked, even though wrought innocently. It is urged that a writ should be granted to correct and cleanse the process in this case and to make certain that there shall be no repetition, in any other case, for want of circumspection, of such unintentioned, yet insidious, impairment of due process.

The usual reluctance to upset a finding of fact should not obtain where there is an injection in the proceedings of a factor which, although unwittingly, operates against unimpaired objectivity of evaluation and of decision; on the contrary, it should be held that such a violation of due process invalidates the determination, without speculating as to whether, in fact, the determination would have been different in the absence of the error.

CONCLUSION

In sum, it is submitted that there has been here a serious (though unintended) violation of petitioner's constitutional right to due process and also a grave (though unwitting) departure from acceptable and proper course of judicial procedure which calls for the exercise of this Court's power of supervision and correction, and, accordingly, this petition for certiorari should be granted.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.

August 20, 1963.